Supreme Court, U. S.
FILED
MAY 12 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1888

ORION RESEARCH INCORPORATED,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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May 12, 1980

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ORION RESEARCH INCORPORATED

v.

ENVIRONMENTAL PROTECTION AGENCY

CIVIL ACTION NO. 75-5071-F

MEMORANDUM

June 15, 1979

FREEDMAN, D.J.

This matter is before the court on cross-motions for summary judgment. Plaintiff Orion Research Incorporated ("Orion") seeks disclosure by defendent Environmental Protection Agency ("EPA") of documents relating to the solicitation of a proposal from and the award of a contract to Meloy Laboratories, Inc. ("Meloy"), a competing bidder on an EPA contract. Orion requests the documents pursuant to the

provisions of the Freedom of Information Act, 5 U.S.C. 552, et seq. ("FOIA").[1] The EPA resists disclosure asserting that the documents in question come within the ambit of Exemptions 4 and 5 of the FOIA, 5 U.S.C. 552 (b) (4) and (5).

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[1] Jurisdiction is conferred upon this court by 552 (4)(B) which provides: On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter do novo and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

In Thyssen Plastik Anger KG v. Induplas, Inc., 576 F. 2d 400 (1st Cir. 1978), the First Circuit instructed that the purpose of the summary judgment procedure is "to pierce formal allegations of facts in the pleadings..., Schreffler v. Bowles, 153 F. 2d 1, 3 (10th Cir. 1946), and to determine whether further exploration of the facts is necessary. Briggs v. Kerrigan, 431 F.2d 967, 968 (1st Cir. 1970)." 576 F.2d 400 at 401, quoting Hahn v. Sargeant, 523 F.2d 461, 464 (1st Cir. 1975). Having considered the pleadings, affidavits, memoranda and pertinent authorities, I find that there is no genuine issue as to any material fact here.[2] See 6 Moore's Federal Practice, 56.11 (1.-2) at 200. Accordingly, further exploration of the facts is not necessary and the case is properly before this Court on the cross-

motions for summary judgment. See 6 Moore's Federal Practice, 56.15 (1.0-0) at 391; accord, William J. Kelly Co. v. MV Sandpiper, 172 F.2d 865 (1st Cir. 1949).

In December 1974, the EPA's Contract Management Division was petitioned by its Environmental Sciences Research Laboratory to obtain the development of a H_2S Source Monitoring System for use in analyzing the hydrogen sulfide content of gases generated by petroleum

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[2]The only factual matters in dispute concern the EPA's procedural handling of Orion's requests. These are not issues of material facts in that the issue here is whether the documents were improperly withheld under Exemptions 4 or 5. See Hahn v. Sargeant, 523 F.2d 461, 464 (1st Cir. 1975).

refineries.[3] An invitation to submit proposals for the desired system was sent to 85 firms in February 1975. Orion and Meloy were among the 13 firms who responded to the invitation by seasonable submitting technical proposals.

In March 1975, James Homolya, designated by the Research Laboratory as the Monitoring System Project Officer, was asked to evaluate the proposals. After receiving Homolya's report, Vincent Mason, the Contracting Officer, determined that the "competitive range" (those firms who, on the basis of their technical proposals, stood a reasonable chance to be awarded

[3]Request for Proposal Number DU 75-B093.

the contract) consisted of three firms: Orion, Meloy and Versar, Inc.

Representatives of Orion and Meloy met separately with EPA officials and were asked to formulate revised technical proposal for the monitoring system. The revised proposals were again referred to Homolya. On May 17, 1975, Homolya notified Betty Peoples, the designated contract negotiator, that Orion's proposal was technically unacceptable.[4] Negotiations with Meloy and Versar, Inc. continued and a contract was ultimately awarded to Meloy on June 30, 1975. Notified of the award to Meloy, Orion requested and received a "debriefing" concerning the selection process on July 23, 1975.

By letter dated August 7, 1975, Orion asked the EPA for a copy of the

"Technical Approach and Work Plan" submitted by Meloy, the successful bidder. The letter was received by the EPA's Freedom of Information Officer on August 11, 1975 and assigned Request Identification Number RIN-385-17. On September 24, 1975, E.T. Rhodes, EPA Deputy Assistant Administrator for Administration, denied Orion's request citing

[4]Homolya's determination that the revised proposal was technically unacceptable effectively reduced the competitive range to two firms, Meloy and Versar, Inc. It appears that Orion's disagreement with the determination resulted in the requests for documents, requests whose denials prompted the filing of this suit.

as justification Exemption 4. Orion took a timely appeal from the negative determination. Robert Zener, EPA General Counsel, denied the appeal on December 19, 1975.

In a letter addressed to Peoples dated August 22, 1975, Orion made a second request to the EPA for " (a) copy of the evaluation plan and the report of the evaluation committee" and "(a)ll relevant Agency memorand contemporaneous with or subsequent to the award of this contract... indlud(ing), but not limited to, memoranda in connection with, or justifying, the award of the contract." This request was received on August 29, 1975 and given number RIN-425-75. Rhodes denied the request on october 3, 1975. Orion's appeal of this

determination was denied by Zener who found that the documents were covered by Exemption 5.[5]

Orion filed a third request for disclosure on September 30, 1975. The letter, received by the EPA on October 15, 1975 and assigned number RIN-563-75 requested:

1. Additional information and cover letter from Meloy....to EPA... which information is made reference to in a letter from Burton Levy to Orion.....

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[5]Zener did agree that the evaluation plan, the scoring system used to evaluate the technical proposals, was not exempt and should be disclosed to Orion.

2. Any and all correspondence between EPA...and Meloy...between June 1, 1975 through september 29, 1975, including, but not limited to, all correspondence relating to Meloy's claim of confidentiality.

3. All correspondence between EPA, Freedom of Information Officer, his agents and servants, General Counsel for the EPA, his assistants, agents and servants, the Deputy Assistant Administrator for Administration, his agents and servants, in the first part, and Meloy... their attorneys, agents and servants, in the second part, between August 7, 1975 and September 29, 1975.

4. Any and all "inter agency memorandums," "final decisions," "final decisions," contemporaneous and "post-decisional" memoranda from June 29, 1975 through September 29, 1975 justifying, relating to, or explaining, the award to Meloy... of Solicitation Number DU-75-B093.

Rhodes notified Orion on November 12, 1975 that the document requests set forth in paragraphs 1, 2 and 3 were repetitive; they had been previously asked for, considered and denied. With respect to the documents described in paragraph 4, Thodes resisted disclosure pursuant to Exemption 5.

Subsequently, on December 10, 1975 Orion filed this action seeking a de novo determination of its asserted right

to the disclosure of the documents withheld by the EPA.

II

It is well-settled that the exemptions set forth in the FOIA must be narrowly interpreted, see Charlotte Mecklenberg Hospital Authority v. Perry, 571 F.2d 195 (4th Cir. 1978); Vaughn v. Rosen, 484 F. 2d 880 (D.C. Cir. 1973;) Bristol-Myers Company v. Federal Trade Commission, 424 F. 2d 935 (D.C. Cir. 1970). Moreover, the agency seeking to withhold the information has the burden of showing that the documents are covered by one of the nine exemptions. EPA v. Mink, 410 U.S. 73, 79 (1972). In the case at bar, the EPA has relied upon Exemptions 4 and 5 as authority for esisting the disclosure of the documents sought by Orion.

Exemption 4 provides: "(t)his section does not apply to matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential." In National Parks v. Morton, 498 F 2d 765 (D.C. Cir. 1974), the D.C. Circuit, while considering whether the Department of the Interior could refuse to disclose certain agency records, formulated a test to be applied when determining whether a matter is confidential within the meaning of this exemption:

> ...commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

498 F 2d at 770. In order to meet this test with respect to documents withheld under this exemption, the EPA must demonstrate that the disclosure of the requested materials would either impede the "ability to obtain necessary information in the future" or cause Meloy "substantial harm to its competitive position."[6]

Exemption 5 reads: "(t)his section does not apply to inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." In EPA v. Mink, supra the Supreme Court considered this exemption.

This language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency. Drawing such a line between what may be withheld and what must be disclosed is not without difficulties..... Still, the legislative history of Exemption 5 demonstrates that Congress inteded to incorporate generally the recognized rule that "confidential intra-agency advisory opinions...are privileged from inspection." Kaiser Aluminum & Chemical Corp. v. United States, 141 Ct. Cl. 38, 49, 157 F. Supp. 939, 946 (1958) (Reed, J.).... But the privilege that has been held to attach to intragovernmental memorada clearly has finite limits, even in civil litigation. In each case,

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[6]In Morton, the documents requested clearly contained commercial or financial information; were obtained from a person and, were not privileged. The issue therefore was whether the information could be termed "confidential" within the meaning of the exexemption. 498 F. 2d at 766. The same is true in the case at bar.

> the question was whether production of the contested document would be "injurious to the consultative functions of government that the privilege of nondisclosure protects." Kaiser Aluminum & Chemical Corp., supra at 49, 157 F.Supp., at 946. Thus...memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the government.

410 U.S. at 86-8; see Herbert v. Lando, No. 77-1105, slip op, (Sup. Ct. April 18, 1979)(Dissent). The court recognized the distinction between "materials reflecting deliberative or policy-making processes" and materials consisting of "purely factual, investigative matters," EPA v. Mink, supra at 89. Documents in the former category would be exempt while those in the latter would have to be disclosed. In order to sustain its burden with respect to those documents

withheld pursuant to Exemption 5 then, the EPA must show that disclosure would be "injurious to the consultative functions of government" in that the documents consist only of "confidential intra-agency advisory opinions" and that any purely factual material is not "severable from its context."

It is against this background that I considered the pleadings and affidavits in order to determine whether either Orion or the EPA has demonstrated that it is entitled to judgment as a matter of law see 6 Moore's Federal Practice, 56.13 at 341.

III

In support of its motion for summary

Judgment, the EPA has offered an affidavit from William E. Mathis, Director of its Contract Management Division. I find Mathis' affidavit to be lacking with respect to some of the requirements of Rule 56(e), F.R. Civ. P. Specifically, the affidavit fails to "show affirmatively that the affiant is competent to testify to matters stated therein"[7] and, it is conclusory rather than a recitation of facts that would be admissable in evidence.

Having found the Mathis affidavit deficient in those respects, I ordered that the documents requested be produced to this court for an in camera inspection. The production of the documents has enabled the Court to decide whether the affiant's failure to establish that they reflect "deliverative or policy-making processes" EPA v. Mink,

supra at 89, or that they consist of only "confidential intra-agency advisory opinions" Kaiser Aluminum & Chemical Corp. v. United States, 141 Ct. Cl. 38, 49, 157 F. Supp. 939, 946 (1958), "Stemmed from mere inadvertence or from a truly overbroad reading of the exemption(s) from the agency" Irons v. Bell, No. 78-1350, slip op. at 6, fn. 6 (1st Cir. March 27, 1979).

IV

Meloy's Technical Proposal

The information contained in this technical proposal comes within the

[7]For example, Mathis fails to indicate how long he has served in the capacity of Director of the EPA's Contract Management Division. The Court, therefore is unaware of the number of years of experience he has. Furthermore, regardless of his tenure, Mathis would be incompetent to testify regarding what other firms would do if Meloy's proposal was disclosed. The government could have offered here affidavits from some of the thirteen firms that submitted proposals. They would, of course, be competent to testify as to what their reaction and future response would be.

perview of Exemption 4.[8] If the EPA were ordered to disclose this plan or others like it, its "ability to obtain necessary information in the future" would be impaired. See National Parks v. Morton, supra at 770.

For the EPA to effectively select the most deserving proposal for any contract award, it must be furnished with candid and original bids. If

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[8]Orion charges that Meloy had tendered substantially the same proposals before in a patent application. This Court makes no finding either way with regard to that charge except to note that, if true, Orion would not be prejudiced by judgment against it here with respect to Meloy's technical proposal; it would already have access to the plan.

forced to disclose information like that contained in Meloy's proposal, the EPA's chances of receiving those types of bids in the future would be substantially diminished. Competing firms would be less likely to include novel ideas in their responses to solicitation for fear that their confidentiality requests would not be honored and competitors would get the benefit of their innovative theories. This, of course, would adversely effect the EPA's chances of awarding the contract to the most deserving firm.

Moreover, disclosure of this and similar successful proposals would enable competing firms to emulate features common to the plans selected. It should be apparent that the practice would impair the agency's capacity to

make informed choices on future contracts.

Evaluation of Technical Proposals (April 1, 1975)

I find that this information is covered by Exemption 5. The memorandum consists of synopses by Homolya of the technical proposals submitted to the EPA. Homolya describes in general terms principal features of the contractor's plan for the H_2S monitoring system, advises Peoples whether or not the proposal is technically acceptable and, in some cases recommends that further information be obtained from the contractor. Clearly, this document is comprised of "confidential intra-agency advisory opinions." Kaiser Aluminum & Chemical Corp., supra, and is therefore exempt from disclosure.

However, the two-page evaluation plan itself is not exempt from disclosure; it should be disclosed if it has not already been made available to Orion.

Review of Langston Laboratories' Proposal
(April 16, 1975)

This memorandum is similar in nature and content to "Evaluation of Technical Proposals" discussed earlier. Here too, Homolya gives his opinion concerning the acceptability of the proposal in question. Accordingly, I find that this material is also covered by Exemption 5.

Competitive Range Determination

This memorandum is compiled over the signature of the Contracting Officer, Mason. It is a final determination

that the competitive range, for purposes of negotiation over the contract award, consists of three firms: Meloy, Orion and Versar, Inc. It cannot be construed in any light merely as an advisory opinion. I cannot comprehend how disclosure of the information contained in this memorandum could be "injurious to the consultative functions of government that the privilege of nondisclosure protects." Kaiser Aluminum & Chemical Corp., supra at 49, 157 F.Supp. at 946.

Review of Modified Technical Proposals (May 17, 1975)

This document consists of Homolya's opinions relative to the modified proposals submitted by the three firms that made up the competitive range.[9] I find it to be covered by Exemption 5. This

type of memorandum would not be availa--able to a party not in litigation with the EPA. See EPA v. Mink, supra.

Review of Cost Proposal Submitted by Meloy
(May 23, 1975)

The information contained in this memorandum is covered by Exemption 5. The documents consist of critical evaluation of the recommendations concerning the reasonableness of Meloy's cost proposal.

Profit/Fee Objectives
(July 29, 1975)

I can find no advisory or deli-

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[9]Orion's continuous argument that Homolya's reports constitute final determinations is not well taken. The records show that Homolya was asked to evaluate the proposals. Having done so, he reported his findings and recommendations. The fact that his findings were adopted by Peoples or Mason does not elevate his advice to the status of a mandate.

berative material contained in the completed form and it does not, therefore, come under Exemption 5. Nor does it come within Exemption 4. Knowing that the EPA scrutinizes fees with this type of intensity can only assist the agency to obtain conservative fee requests in the future.

Record of Procurement Action

It is admitted that this memorandum, in part, consists of purely historical fact. Since this historical fact is severable from its context, see EPA v. Mink, supra, it must be disclosed. The initial two pages are, therefore, not exempt from disclosure to Orion. The balance of the document (three pages), however, is comprised of advisory opinions and need not be produced; it is covered by Exemption 5.

Cost Advisory Report
(July 14, 1975)

This memorandum is a report from Albert King, Chief of the EPA's Cost Advisory Branch, to Peoples concerning Meloy's cost proposal. It clearly consists of a recommendation; an intra-agency advisory opinion. While there is evidence of some compilation of factual material here also, I found that it is not severable from its context, see EPA v. Mink, supra at 88. Accordingly, I find that the material contained in this document comes within the ambit of Exemption 5.

V

To summarize, I found the affidavits offered in this case to be inconclusive on the issue of whether the withheld documents came within the coverage of Exemptions 4 or 5 of the

FOIA. However, I concluded from the record that a trial on the merits of this matter would be a misuse of judicial economy. This conviction, coupled with the realization that the legal issue of the applicabilty of the exemptions depended in large part upon the factual nature of the contents of the documents, see Irons v. Bell, supra, prompted an Order calling for an in camera inspection of the materials.

By virtue of that inspection, I have determined that the documents withheld by the EPA are exempt from disclosure by Exemption 4 and/or Exemption 5, subject to the following exceptions:

1) the two-page memorandum entitled "Competitive Range Determination,"

2) one-page document captioned "Profit/Fee Objectives," and

3) The first two pages of a five-page memorandum entitled "Record of Procurement Action."

These specifically described documents contain information that is not exempt from disclosure under any provision of the FOIA; they should be provided to Orion.

An appropriate Order shall enter in accordance with this memorandum.

Signed: Frank H. Freedman
United States District Judge

United States Court of Appeals
For the First Circuit

No. 79-1293

ORION RESEARCH INCORPORATED,

PLAINTIFF, APPELLANT,

v.

ENVIRONMENTAL PROTECTION AGENCY,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK H. FREEDMAN, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH, *Circuit Judge*,
BONSAL,* *Senior District Judge*.

Robert W. Hagopian, with whom *John Stopa* was on brief, for appellant.

John D. Hanify, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellee.

February 11, 1980

BONSAL, *District Judge*. On December 10, 1975, Plaintiff-Appellant, Orion Research Incorporated ("Orion"), instituted this action pursuant to the Freedom of Information Act, 5 U.S.C. §552 ("FOIA"), to enjoin Defendant-Appellee, the Environmental Protection Agency, ("the EPA") from withholding from it certain documents it had requested. Both sides moved for summary judgment. Following its *in camera* inspection, the district court ordered the

* Of the Southern District of New York, sitting by designation.

EPA to furnish to Orion certain of the documents or portions thereof requested by Orion and determined that the remaining documents or portions thereof were exempt from disclosure pursuant to Exemptions 4 and 5 of the FOIA, 5 U.S.C. §§ 552(b)(4) and (b)(5). Orion appealed. We affirm.

In February 1975, the EPA's Contract Management Division invited eighty-five firms to submit technical proposals for the development of a Hydrogen Sulfide Source Monitoring System to analyze the hydrogen sulfide content of gases generated by petroleum refineries. Thirteen firms, including Orion, submitted technical proposals. In March 1975, James Homolya, the Monitoring System Project Officer, forwarded a report to Vincent Mason, the Contracting Officer, evaluating these proposals, concluding that three firms—Orion; Meloy Laboratories, Inc. ("Meloy"); and Versar, Inc.—were in the "competitive range." Thereafter, Orion and Meloy submitted revised technical proposals, which were referred to Homolya. In May 1975, Homolya informed Betty Peoples, the contract negotiator, that Orion's proposal was technically unacceptable, and on June 30 the contract was awarded to Meloy.

Pursuant to the FOIA, Orion requested the EPA to furnish it with a number of documents, including the evaluation plan used by the EPA to score the technical proposals, the Meloy Technical Proposal, and various intra-agency memoranda.

The EPA furnished to Orion the evaluation plan, but withheld the remaining documents, citing Exemption 4 with respect to the Meloy Technical Proposal and Exemption 5 with respect to the intra-agency memoranda.

On December 10, 1975, Orion instituted this action to require the EPA to deliver the remaining documents, and on May 14, 1976, moved for summary judgment. On April

5, 1978,[1] the EPA cross moved for summary judgment, relying on the affidavit of William E. Mathis, Director of the Contract Management Division of the EPA, sworn to July 13, 1976 ("the Mathis affidavit"). On September 25, 1978, the district court ordered the withheld documents produced for *in camera* inspection, together with an index correlating each withheld document with the exemptions claimed. Following its *in camera* inspection, the district court directed the EPA to furnish certain documents, or portions thereof, and found the Meloy Technical Proposal and certain intra-agency memoranda, or portions thereof, exempt from disclosure. Orion appealed.

Orion contends that for purposes of summary judgment, the EPA did not satisfy its burden of proving that there is "no genuine issue as to any material fact." Fed.R.Civ.P. 56(c); *see Hahn* v. *Sargent*, 523 F.2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). It is true that the district court found the Mathis affidavit, relied on by the EPA to support its cross motion for summary judgment, "to be lacking with respect to some of the requirements of Rule 56(e), F.R.Civ.P."[2] *Orion* v. *Environmental Protection Agency*, No. 5071, slip op. at 7 (D. Mass. June 15, 1979). However, the district court ordered the EPA to produce the documents for *in camera* inspection, together with an

[1] There is no explanation in the record as to why the EPA's cross motion was filed almost two years after Orion's motion for summary judgment.

[2] The district court stated that the affidavit does not " 'show affirmatively that the affiant is competent to testify to matters stated therein,' " *Orion* v. *Environmental Protection Agency*, No. 75-5071, slip op. at 8 (D. Mass. June 15, 1979) (quoting Fed.R. Civ.P. 56(e)), and that the affidavit is conclusory, failing to set forth facts that would be admissible in evidence. Specifically, the district court found that the affidavit failed to state how long the affiant had been director of the EPA's Contract Management Division and that the affiant was incompetent to testify regarding what other firms would do if the Meloy Technical Proposal were disclosed. *Orion, supra* at 7-8 & n. 7.

index correlating each withheld document with the exemptions claimed. *See Irons* v. *Bell*, 596 F.2d 468 (1st Cir. 1979).

Orion further contends that the evidence offered by the EPA did not satisfy its FOIA burden of proving that the withheld material is exempt from disclosure. The FOIA does provide that an agency has the burden of proving that withheld material falls within an FOIA exemption. 5 U.S.C. §552(a)(4)(B). To satisfy this burden, the agency must furnish a detailed description of the contents of the withheld material and of the reasons for nondisclosure, correlating specific FOIA exemptions with relevant portions of the withheld material. *National Parks and Conservation Ass'n* v. *Kleppe*, 547 F.2d 673 (D.C. Cir. 1976); *Pacific Architects and Engineers, Inc.* v. *Renegotiation Board*, 505 F.2d 383 (D.C. Cir. 1974); *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Cuneo* v. *Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Such a description is necessary since the party seeking disclosure does not know the contents of the withheld material whereas the agency has access to the material. The description furnished by the agency therefore must be sufficiently detailed "to permit the requesting party to present its case effectively," *Mead Data Central, Inc.* v. *United States Department of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977), but it need not "contain factual descriptions that if made public would compromise the secret nature of the information." *Vaughn, supra* at 826.

Here, the EPA submitted the Mathis affidavit and an index, that, taken together, describe the contents of the withheld material and explain the reasons for nondisclosure, correlating specific exemptions to disclosure under the FOIA with relevant portions of the withheld material. Upon reviewing the Mathis affidavit, we find that it, in conjunction with the index and the district court's *in camera* inspection of the documents themselves, satisfied the EPA's burden of proof. *See Irons* v. *Bell*, *supra*.

THE MELOY TECHNICAL PROPOSAL

The district court found that the Meloy Technical Proposal was exempt from disclosure pursuant to Exemption 4, which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). The district court stated:

> "If the EPA were ordered to disclose this plan or others like it, its 'ability to obtain necessary information in the future' would be impaired. *See National Parks* [*Conservation Association* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)].
>
> "For the EPA to effectively select the most deserving proposal for any contract award, it must be furnished with candid and original bids. If forced to disclose information like that contained in Meloy's proposal, the EPA's chances of receiving those types of bids in the future would be substantially diminished. Competing firms would be less likely to include novel ideas in their responses to solicitation for fear that their confidentiality requests would not be honored and competitors would get the benefit of their innovative theories. This, of course, would adversely effect [*sic*] the EPA's chances of awarding the contract to the most deserving firm.
>
> "Moreover, disclosure of this and similar successful proposals would enable competing firms to emulate features common to the plans selected. It should be apparent that the practice would impair the agency's capacity to make informed choices on future contracts." *Orion, supra* at 8-9.

We reject Orion's contention that the EPA must offer extrinsic evidence as to the effect disclosure of the Meloy Technical Proposal would have on potential bidders. The agency is in the best position to determine the effect of disclosure on its ability to obtain necessary technical in-

formation. Moreover, the involvement in litigation of firms submitting proposals could well deter them from providing information to the EPA in the future. This is not to say that the mere conclusory say-so of an agency that its ability to acquire information would be impaired will suffice. But where the conclusion is plausibly supported in some detail, as it is here by the continuing need for eliciting ideas of both a technical and novel nature, we will not require more.

We therefore hold that the district court committed no error of law or abuse of discretion in finding that disclosure of the Meloy Technical Proposal to a competitor of Meloy would have a chilling effect on the willingness of Meloy or other potential bidders to submit proposals to the EPA. These proposals may contain information a firm would not want disclosed to its competitors. As the district court pointed out, fear of disclosure would induce potential bidders to submit proposals that do not include novel ideas. Accordingly, we find that the Meloy Technical Proposal is exempt from disclosure under Exemption 4.

THE INTRA-AGENCY MEMORANDA

The intra-agency memoranda were found by the district court to be exempt pursuant to Exemption 5, which applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552 (b)(5). This exemption was enacted to free decision makers from "the threat of cross-examination in a public tribunal," *Ackerly* v. *Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969). The exemption does not apply to purely factual material, *EPA* v. *Mink*, 410 U.S. 73, 87-88 (1973); *Schwartz* v. *IRS*, 511 F.2d 1303, 1305 (D.C. Cir. 1975), or final memoranda that "represents policies, statements or interpretations of law that the agency has actually adopted." *Schwartz*, *supra*

at 1305; *see NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

Orion contends that the four memoranda written by Homolya to Mason or Peoples were final memoranda if Homolya had decisional authority. However, Orion offered no evidence rebutting the EPA's contention that Mason, the contracting officer, not Homolya, had decisional authority and that the four intra-agency memoranda were prepared by Homolya for the purpose of advising Mason. Orion speculates that Mason may have been a rubber stamp for Homolya, in which event Homolya would have made the final decision and his memoranda would not be exempt under Exemption 5.[3] To indulge in such speculation would permit every FOIA plaintiff to roam in the bureaucratic pasture to determine the ratings of the bureaucrats and which ones had decisional authority so as to avoid Exemption 5.[4]

Orion contends that two of the intra-agency memoranda contain factual and post-decisional material that must be disclosed if severable. The district court's finding that these documents or portions thereof are exempt from disclosure was based on its *in camera* inspection of the documents as well as on the Mathis affidavit.

The decision of the district court is affirmed.

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[3] It should be noted that, "[w]hile . . . the [party opposing a summary judgment motion] is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture." *Hahn* v. *Sargent*, *supra* at 467 (quoting *Manganaro* v. *Delaval Separator Co.*, 309 F.2d 389, 393 (1st Cir. 1972)).

[4] The sole authority for appellant's argument that "de facto final opinions" do not fall within Exemption 5 is *Kent Corp.* v. *NLRB*, 530 F.2d 612 (5th Cir. 1976) (dictum). We need not decide whether we would endorse this exception to Exemption 5, since summary judgment was appropriate, even applying the law most favorable to appellant.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.